

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

SR. No.514

CRA-S-978-SB-2005(O&M)
Decided on:07.06.2023

Yogesh @ Pappe

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE N.S. SHEKHAWAT

Present: Mr. B.S. Saroha, Advocate,
for the appellant.

Ms. Sheenu Sura, DAG, Haryana.

N.S. SHEKHAWAT, J.

1. The present appeal is directed against the judgment of conviction dated 27.04.2005 and order of sentence dated 29.04.2005 passed by the learned Special Judge, Rohtak, whereby the accused/appellant was convicted and sentenced to undergo rigorous imprisonment for a period of two and half years for the offence punishable under Section 17(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 NDPS (for short 'the NDPS Act') and to undergo rigorous imprisonment for a period of three years for the offence punishable under Section 20(b)(II)(B) of the NDPS Act with fine of Rs.20,000/- each along with default stipulation. Both the sentences were ordered to run concurrently.

2. Brief facts of the prosecution case are that on 30.04.2001, Inspector Satbir Singh, CIA Staff, Rohtak, received a secret information on phone that Yogesh @ Pappe, accused, was selling charas at "Kashaiyon Wala Chowk" (Butcher's circle) Indira market, Rohtak and if a raid was conducted immediately, he could be apprehended at the spot itself. An entry

was made in the Daily Dairy Register in this regard and a copy of the same was also transmitted to the senior officers of the police through Constable Pardeep Kumar. A raiding party was constituted and the team headed by Inspector Satbir Singh went at the disclosed place. On noticing the party headed by Inspector Satbir Singh, the accused tried to run away from the spot, but he was apprehended on the basis of suspicion. He was questioned by the police team and he disclosed his name as Yogesh @ Pappe son of Ramesh. A notice under Section 50 of the NDPS Act was served upon the appellant and he was apprised of his right to get himself searched in the presence of a gazetted officer or a Magistrate. The accused replied immediately and opted to get his search conducted before a gazetted officer. A wireless message was sent to DSP Kartar Singh in this regard, who came at the spot with his staff and he again served a notice Ex.PC upon the accused, requiring him to state as to whether he was willing to get his search conducted before him or a Magistrate. Again the accused opted that he would get his search conducted before him only. At the instance of Inspector Satbir Singh, the search of the accused was conducted and 400 grams of charas was found, wrapped in a polythene paper, which was kept by him in the right side pocket of his pant. Five grams of charas was separated as sample and two separate parcels were prepared. Apart from that, 100 grams of opium, wrapped in a polythene paper, was also recovered from the front side pocket of his shirt and 5 grams of the opium was separated as sample and was put in empty match box. The remaining quantity of opium was kept in a small box. Separate parcels were prepared and were duly sealed by the police. All the parcels were taken into possession vide separate memo, which was attested by the witnesses. After completion of the necessary formalities with regard to search and seizure, a ruqa was sent to Police

Station, City Rohtak, on the basis of which, a formal FIR was registered by SI Pitajali Kumar. After receipt of the copy of the FIR, the rough site plan of the place of recovery was also prepared and the statements of the witnesses were recorded. The witnesses, the accused and the case property were produced before Kailash Chand, SHO, Police Station City Rohtak, who verified the facts from them and affixed his seal bearing inscription 'KC' on all the parcels and directed the Inspector Satbir Singh to deposit the case property with MHC and to keep the accused in lockup. After necessary investigation, the challan was presented against the accused before the competent court.

3. After taking into consideration the incriminating evidence collected during the course of investigation, charges under Sections 20(b)(II) (B) and 17(b) of the NDPS Act were ordered to be framed by the learned Special Judge, Rohtak against the accused-appellant. The contents of the charges were read over and explained to the appellant, but he pleaded his false implication in the matter and claimed that he was innocent.

4. After framing of charges, the prosecution examined 12 witnesses to bring home the guilt of the appellant. The prosecution examined HC Charan Singh as PW-1; SI Pitajali Kumar as PW-2; HC Rajender Singh as PW-3; DSP Kartar Singh as PW-4; SI Behram Singh as PW-5; EHC Jagbir Singh as PW-6; Constable Randhir Singh as PW-7; ASI Hukam Singh as PW-8; ASI Kalaner Singh as PW-9; Inspector Sajjan Kumar as PW-10, Inspector/SHO Kailash Chander as PW-11 and Inspector Satbir Singh as PW-12.

5. I have heard learned counsel for the parties and with their assistance, I have gone through the trial Court record carefully.

6. Learned counsel for the appellant vehemently argued that in the

present case, the mandatory provisions of Section 42 of the NDPS Act were not complied with and since there is breach of mandatory provisions of law and the appellant is liable to be acquitted by this Court. Still further, learned counsel for the appellant argued that in the present case, PW-4 DSP Kartar Singh was called at the spot and he had given an offer vide notice Ex.PC that the accused could get the search conducted in his presence or in the presence of a Magistrate. Thus, the offer given to the appellant under Section 50 of the NDPS Act was defective and the appellant deserves to be acquitted only on this ground. Apart from that, the recovery of the contraband was allegedly effected from the present appellant from a busy locality at a chowk. There was no reason for non-joining of public witnesses with the police party, before conducting the alleged raid upon the present appellant. Since no public witness was joined by the police party during the process of search and seizure, it clearly shows that the entire case had been fabricated against the appellant, while sitting in a police station. Apart from that, there was no evidence to show that the sample impressions of the seals had been prepared at the spot and the entire process was conducted in the police station itself. Furthermore, there were material contradictions in the testimonies of various official witnesses.

7. On the other hand, learned counsel appearing for State of Haryana opposed the submissions made by learned counsel for the appellant. Learned State Counsel contended that in the present case, the recovery had been effected from a public place i.e. “Kashaiyon Wala Chowk” (Butchers’ circle), Indira market, Rohtak. Since the recovery was effected from a public place, the provisions of Section 42 of the NDPS Act would not apply and rather the provisions of Section 43 of the NDPS Act would apply. Learned State Counsel further submitted that vide notice Ex.PE, the offer was given

to the present appellant to get his search conducted either in the presence of a gazetted officer or a Magistrate. However, vide reply Ex.PE/1, the accused opted that his search might be conducted in the presence of a gazetted officer. As a consequence, the information was sent and DSP Kartar Singh, PW-4 reached at the spot in his official vehicle and the recovery was effected at his instance. Simply because another notice Ex.PC was served upon the accused, it would not make much of difference as it was not the mandatory requirement of law. There was no need of serving the second notice on the present appellant/accused and the argument raised by learned counsel for the appellant is without any substance. Apart from that, the prosecution case was based on the testimonies of 12 prosecution witnesses, who were cross-examined at length, however their testimonies could not be shaken in any manner and the trial Court had recorded detailed findings, while delivering the impugned judgment of conviction.

8. After hearing learned counsel for both the sides and having considered the evidence led by the parties, this Court is of the considered view that the impugned judgment is liable to be upheld by this Court in view of the discussion made hereinafter.

9. There is no substance in the argument raised by learned counsel for the appellant that there was a breach of mandatory provisions of Section 42 of the NDPS Act. In fact in the present case, as per the document from record and the evidence of the witnesses, the search and seizure took place at “Kashaiyon Wala Chowk” (Butchers’ circle), Indira market, Rohtak, which is a public place. That being so, it is the provision of Section 43 of the NDPS Act, which would be applicable. Further, as Section 42 of the NDPS Act was not applicable in the present case, the seizure having being effected in the public place, the question of non-compliance, if any, of the provisions of

Section 42 of the NDPS Act is wholly irrelevant. The Hon'ble Supreme Court has held in the matter of **Directorate of Revenue and another v/s Mohammad Nisar Holia, 2008 (1) RCR (Criminal) 241**, as follows:-

“Section 43, on plain reading of the Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under sub-section (1) of Section 42, need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with. An interpretation which strikes a balance between the enforcement of law and protection of the valuable human right of an accused must be resorted to. A declaration to the effect that the minimum requirement, namely, compliance of Section 165 of the Code of Criminal Procedure would serve the purpose may not suffice as non-compliance of the said provision would not render the search a nullity. A distinction therefor must be borne in mind that a search conducted on the basis of a prior information and a case where the authority comes across a case of commission of an offence under the Act accidentally or per chance. It is also possible to hold that rigours of the law need not be complied with in a case where the purpose for making search and seizure would be defeated, if strict compliance thereof is insisted upon. It is also possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefor coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the

hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or house keeping of the room, the guest is entitled to maintain his privacy. The very fact that the Act contemplated different measures to be taken in respect of search to be conducted between sunrise and sunset, between sunset and sunrise as also the private place and public place is of some significance. An authority cannot be given an untrammelled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. What would be reasonable restrictions would depend upon the nature of the statute and the extent of the right sought to be protected. Although a statutory power to make a search and seizure by itself may not offend the right of privacy but in a case of this nature, the least that a court can do is to see that such a right is not unnecessarily infringed. Right of privacy deals with persons and not places.”

10. This Court finds no substance in the argument raised on behalf of the appellant that in the given facts and circumstances of the present case, there was violation of mandatory provision of Section 50 of the NDPS Act. In fact vide notice Ex.PE, issued by Inspector Satbir Singh to the appellant, an offer was given to him to get his search conducted either in the presence of a gazetted officer or a Magistrate. Vide reply Ex.PE/1, the appellant immediately replied that he wanted to get his search conducted in the presence of a gazetted officer. Later on DSP Kartar Singh (PW-4) came at the spot and issued another notice Ex.PC to the appellant, asking him as to whether he wanted to get his search conducted from him or some Magistrate. In fact, there was no mandatory requirement of issuing second notice under Section 50 of the NDPS Act. In the present case, the appellant was already apprised of his right vide notice Ex.PE to get his search conducted either in

the presence of a gazetted officer or a Magistrate, which was the requirement of law. Thus, it can never be said that there was breach of mandatory provisions of law and the said argument is liable to be rejected by this Court.

11. The argument raised by the learned counsel for the appellant that there was no independent corroboration of the case of the prosecution, is also bereft of merits. In the present case, the police team headed by PW-12, Inspector Satbir Singh had conducted the search and seizure. At the first instance, it cannot be believed that such a huge quantity of charas and opium was planted on the present appellant by the police team nor the appellant has attributed any motive for his falsely involving him in a criminal case by a local police. Still further, the law is well settled that the evidentiary value of the official witnesses is at par with the private witnesses. The statements of the official witnesses cannot be rejected only on the ground of their official status. No doubt, as a rule of caution, the courts must be careful in scrutinising the testimonies of such official witnesses, but at the same time, it cannot be a ground for disbelieving and discarding their testimonies. In the present case, this Court has perused the testimonies of PW-12 Inspector Satbir Singh, which is duly supported by the testimonies of PW-5 SI Braham Singh and PW-9 ASI Kalender Singh and all the said witnesses had been cross-examined at length. However, the testimonies of such witnesses apparently inspire confidence and have been rightly believed by the learned trial Court, while recording the verdict of conviction against the appellant.

12. Still further, learned counsel for the appellant has referred to certain minor inconsistencies and contradictions appearing in the statements of various prosecution witnesses. I have perused the findings recorded by the learned trial Court and the learned trial Court has correctly rejected such contentions by recording detailed findings in this regard. It is a matter of

common knowledge that the witnesses get a chance to appear before the court after a long period and certain minor inconsistencies are bound to creep in the testimonies of the witnesses, who were truthful. Even otherwise, the police has to conduct raids at different places and sometimes with the passage of time, there memory fades and such contradictions appear. But this can never be a ground for rejection of the testimonies of such witnesses. Even otherwise, this Court has perused the impugned judgment carefully and the learned trial Court has recorded valid reasons, while convicting the present appellant. Thus, the impugned judgment of conviction dated 27.04.2005 passed by the learned Special Judge, Rohtak, is order to be upheld.

13. From the record, it is apparent that the appellant had paid the fine immediately on the same day. Learned counsel for the appellant argued that a lenient view may be taken, while awarding the sentence on him. This Court finds sufficient force in the said submission raised on behalf of the appellant. This Court is conscious of the fact that recovery of the contraband had taken place from the present appellant on 30.04.2001, i.e., almost 22 years back. The appellant is on bail in this matter since 29.04.2005. As per the custody certificate filed by the learned State Counsel, the present appellant has already undergone 4 months and 23 days of actual sentence out of total imprisonment of 3 years. However, in the last 18 years, he has not misused the concession of bail and he is a first offender. No other criminal case was registered against him in the last about more than 18 years. Even as per the charge-sheet, he was aged about 25 years as on 03.08.2001 at the time of framing of charges. Consequently, he is aged about 47 years at present and is the only bread earner of the family.

14. Taking into consideration the totality of the circumstances, the

substantive sentence of the appellant is reduced to the period already undergone by him subject to payment of Rs.20,000/- as enhanced fine (in addition to the fine already imposed upon him by the learned trial Court) which shall be deposited by the appellant with Punjab and Haryana High Court Bar Association Lawyers' Family Welfare Fund within a period of 03 months; failing which, the appellant shall undergo rigorous imprisonment for a period of 06 months as observed by the learned trial Court in its order of sentence dated 29.04.2005.

15. With the above modification, the present appeal stands partly allowed in the above terms. Pending application(s), if any, shall also stand disposed of.

16. Case property, if any, be dealt with, and, destroyed after the expiry of period of limitation. The trial Court record be sent back.

07.06.2023
mks

(N.S. SHEKHAWAT)
JUDGE

Whether Speaking/Reasoned: YES / NO

Whether Reportable: YES / NO